Lau Ming Hing Richard v Bank Pembangunan Malaysia Bhd

HIGH COURT (KUCHING) — SUIT NO KG211 OF 1989
CHONG SIEW FAI J
16 APRIL 1994

Civil Procedure *— Judgment — Setting aside — Judgment did not state that it was a consent judgment — Whether judgment was consent judgment — Whether a ground for setting aside*

Civil Procedure *— Judgment — Setting aside — Consent judgment — Judgment sum larger than debt owed — Whether consent judgment should be set aside*

Civil Procedure *— Judgment — Setting aside — Consent judgment — No date entered on guarantee to signify guarantor's signature — Whether judgment could be set aside*

Civil Procedure *— Judgment — Setting aside — Consent judgment — Fraud — Full particulars must be given — Mere allegations insufficient*

Civil Procedure *— Judgment — Setting aside — Consent judgment — Plaintiff applies to strike out defendant's application to set aside judgment — Defendant must show that he will probably succeed in setting aside consent judgment if the action is allowed to proceed*

Civil Procedure *— Judgment — Setting aside — Consent judgment — Delay — Whether bankruptcy proceedings brought by plaintiff could justify defendant's delay*

Legal Profession *— Retainer — Authority — Implied authority to compromise — Whether authority was limited by client — Whether limitation brought to notice of opposite party*

In 1983, the defendant ('the bank') sued the plaintiff ('Lau') and four others as guarantors for a loan advanced to Santiasa Hygienic Sdn Bhd. At the hearing of the summons for summary judgment in 1984, Lau's advocate, George Lo, said that Lau had no objection to the application and the court struck out Lau's defence and ordered final judgment ('the order') to be entered against him in the sum of RM129,947.94 with interest and costs.

In this suit, Lau sought to set aside the order on the grounds that: (1) he did not execute the guarantee and only discovered this sometime in May 1989; (2) the order was obtained illegally, it being for a larger sum than that owing at the time of entering the order; and (3) the bank had failed to disclose 'such material fact during the time of obtaining the order' and he had suffered damages resulting from the order and two unsuccessful bankruptcy proceedings following thereupon. Lau also raised the issues, inter alia, of: (i) fraud; and (ii) lack of authority on the part of George Lo to consent to the order, although these were not pleaded in his statement of claim. The bank applied to strike out Lau's writ of summons and statement of claim

under O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980. A

Held, allowing the bank's application:

(1) Although the order did not expressly state that it was made by consent, there can be no denial that it was a consent order. That was clear from the notes of proceedings. That being so, the omission to state in the order that it was made by consent does not affect the fact that it was so made. In any event, Lau himself conceded that the order was a consent order in para 3 of his affidavit and the order had been drawn up and entered. B

(2) Lau's allegation that he did not execute the guarantee ran counter to the affidavit evidence of the bank. More importantly, in his own letter and affidavit, Lau admitted that he was one of the guarantors. Those were clear, unequivocal and uncontradicted admissions. Lau's denial of the execution of the guarantee by relying on the fact that no date was filled in the column to indicate his signature did not, in itself, indicate that the signature was not his. C D

(3) Although the order was for a sum larger than what was owed at the time the order was entered, as a matter of law, a consent order will not be set aside on the ground of a mistake where the mistake would not suffice to impeach the agreement on which the order was based. More importantly, no injustice was done since the excess amount could be deducted from the judgment sum in the consent order. The modern tendency of the courts seems to lean in favour of allowing amendment of a judgment debt to a lesser sum in cases of accidental slip or omission rather than setting aside the whole sum, where justice permits the former course to be adopted. E F

(4) Lau's contention that there was no inordinate delay on his part in applying to set aside the order by reason of the bankruptcy proceedings instituted by the bank against him was not acceptable. Bankruptcy proceedings are no bar to making an application to set aside the order or judgment. G

(5) The principle governing actions to set aside a consent order or judgment is that the court will apply the same principles as though the judgment was a contract or compromise of which rescission is sought. The court may refuse to set aside a compromise or consent order or judgment where the party seeking to set it aside is guilty of delay in questioning it and in the instant case, Lau had delayed for over four or five years. H

(6) Lau's allegations of non-disclosure of material fact and damages suffered by the bankruptcy petitions were unclear. The bankruptcy petitions taken out against Lau by the bank were based on and consequential to the consent order. As long as the consent order was in force or not set aside, the bank was entitled to act upon it. As for the damages allegedly suffered, the two bankruptcy petitions I

were unsuccessful and Lau would have been entitled to costs, if asked for.

(7) In an action to set aside a consent order, fraud, if relied on, must be alleged with full particulars and not in mere general terms. And, in an application to dismiss the action under O 18 r 19, the plaintiff has to show in his statement of claim that his action is justified and must also satisfy the court by affidavits that he will probably succeed in setting aside the consent order or judgment if the action is allowed to proceed. In the instant case, no particulars of the alleged fraud were given in Lau's affidavit, nor was fraud specifically pleaded in his statement of claim.

(8) As advocate for Lau, George Lo had a general authority to agree to a consent order or to compromise any matter on his behalf provided that he acted bona fide and not contrary to express negative instructions. A client cannot impose a limitation upon the implied authority of the advocate to compromise the proceedings unless the limitation has been brought to the notice of the opposite party. There was no evidence to substantiate Lau's allegations or to show that the bank or the bank's advocate had notice or knowledge of any limitation on the implied authority of George Lo to compromise the proceedings. Furthermore, the alleged lack of authority had not been pleaded in the statement of claim. The writ of summons and the statement of claim were struck out on the grounds that the action is frivolous or vexatious or an abuse of the process of the court.

[Bahasa Malaysia summary

Pada tahun 1983, defendan ('bank itu') telah mendakwa plaintif ('Lau') dan empat orang yang lain sebagai penggerenti untuk suatu pinjaman yang telah diberikan kepada Santiasa Hygienic Sdn Bhd. Pada pendengaran saman untuk penghakiman terus pada tahun 1984, peguambela Lau, George Lo, telah berkata bahawa Lau tidak membantah terhadap permohonan itu dan mahkamah telah membatalkan pembelaan Lau dan memerintahkan supaya penghakiman muktamad ('perintah itu') dicatatkan terhadapnya bagi jumlah RM129,947.94 dengan faedah dan kos.

Di dalam guaman ini, Lau telah memohon supaya mengetepikan perintah itu atas alasan bahawa: (1) beliau tidak menyempurnakan gerenti itu dan hanya mengetahui fakta ini pada Mei 1989; (2) perintah itu telah diperolehi dengan menyalahi undang-undang kerana ianya untuk suatu jumlah yang lebih besar daripada jumlah yang dihutang pada masa perintah itu dicatatkan; dan (3) bank itu gagal mendedahkan 'fakta material semasa mendapatkan perintah itu' ('such material fact during the time of obtaining the order') dan beliau telah mengalami ganti rugi akibat daripada perintah itu dan dua prosiding kebankrapan yang tidak berjaya yang dibawa berikutan perintah itu. Lau juga telah membangkitkan isu, antara lain, bahawa: (i) terdapat fraud; dan

(ii) ketiadaan kuasa pada pihak George Lo untuk bersetuju kepada perintah itu, walaupun ini tidak diplikan di dalam pernyataan tuntutannya. Bank itu telah memohon untuk membatalkan writ saman dan pernyataan tuntutan Lau di bawah A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, membenarkan permohonan bank itu:

(1) Walaupun perintah itu tidak secara nyata berkata bahawa ianya telah dibuat dengan persetujuan, tidak boleh dinafikan bahawa ianya merupakan suatu perintah persetujuan. Itu jelas daripada nota prosiding. Dengan itu, ketinggalan untuk menyatakan demikian di dalam perintah itu tidak mengubah hakikat bahawa ianya telah dibuat sedemikian. Walau bagaimanapun, Lau sendiri telah mengaku bahawa perintah itu adalah suatu perintah persetujuan di dalam perenggan 3 afidavitnya dan perintah itu telah disediakan dan dicatatkan.

(2) Pengataan Lau bahawa beliau tidak menyempurnakan gerenti itu bertentangan dengan keterangan afidavit bank itu. Lebih penting lagi, melalui surat dan afidavitnya sendiri, Lau telah mengaku bahawa beliau merupakan salah satu daripada penggerenti pinjaman itu. Itu merupakan pengakuan jelas yang tidak disangkal. Penafian Lau bahawa beliau telah menyempurnakan gerenti itu dengan bergantung kepada hakikat bahawa tidak ada tarikh yang telah diisikan di dalam ruang berkenaan untuk menandakan tandatangannya, tidak, dengan sendirinya, menunjukkan bahawa tandatangan itu bukan tandatangan beliau.

(3) Walaupun perintah itu adalah untuk suatu jumlah yang lebih daripada apa yang dihutang pada masa perintah itu telah dicatatkan, mengikut undang-undang, suatu perintah persetujuan tidak akan diketepikan kerana suatu kesilapan di mana kesilapan itu tidak mencukupi untuk mencabar persetujuan yang menjadi dasar perintah itu. Lebih penting lagi, ketidakadilan tidak akan dilakukan kerana jumlah berlebihan itu boleh ditolak daripada jumlah penghakiman di dalam perintah persetujuan itu. Kecenderungan moden mahkamah nampaknya memihak kepada membenarkan pindaan suatu jumlah penghakiman kepada suatu jumlah yang kurang di dalam kes kesilapan atau ketinggalan yang tidak sengaja berbanding dengan mengetepikan jumlah keseluruhannya, di mana keadilan membenarkan jalan pertama digunakan.

(4) Penegasan Lau bahawa tidak ada kelengahan yang keterlaluan pada pihaknya apabila memohon untuk mengetepikan perintah itu oleh sebab prosiding kebankrapan telah dimulakan oleh bank itu terhadapnya, tidak boleh diterima. Prosiding kebankrapan tidak merupakan halangan kepada suatu permohonan untuk mengetepikan perintah atau penghakiman itu.

(5) Prinsip yang menentukan tindakan untuk mengetepikan suatu perintah atau penghakiman persetujuan adalah bahawa mahkamah

akan memakai prinsip yang sama seperti jika penghakiman itu merupakan suatu kontrak atau kompromi untuk mana pembatalan dipohon. Mahkamah boleh tidak mengetepikan suatu kompromi atau perintah persetujuan di mana pihak yang memohon pengetepiannya itu berlengah-lengah dalam mempersoalkannya dan di dalam kes ini, Lau telah berlengah-lengah selama lebih daripada empat atau lima tahun.

(6) Penegasan Lau mengenai ketidakdedahan fakta material dan kerugian yang dialaminya akibat daripada petisyen kebankrapan itu tidak jelas. Petisyen kebankrapan yang diambil terhadap LAu oleh bank itu berdasarkan dan akibat daripada perintah persetujuan itu. Selagi perintah persetujuan itu masih berkuatkuasa atau tidak diketepikan, bank itu berhak bertindak ke atasnya. Berkenaan dengan ganti rugi yang kononnya telah dialami, kedua-dua petisyen kebankrapan itu tidak berjaya dan Lau berhak mendapatkan kos, jika dipohon.

(7) Di dalam suatu tindakan untuk mengetepikan suatu perintah persetujuan, fraud, jika ianya menjadi dasar permohonan itu, mesti dikatakan dengan butir-butir penuh dan bukan hanya secara am. Dan, di dalam suatu permohonan untuk membatalkan tindakan itu di bawah A 18 k 19, plaintif mesti menunjukkan di dalam pernyataan tuntutannya bahawa tindakannya berjustifikasi dan juga mesti memuaskan mahkamah melalui afidavit bahawa beliau mungkin berjaya mengetepikan perintah atau penghakiman persetujuan itu jika tindakan itu dibenarkan berterusan. Di dalam kes ini, butir-butir mengenai fraud yang dikatakan itu tidak diberikan di dalam afidavit Lau, dan fraud juga tidak diplikan secara spesifik di dalam pernyataan tuntutannya.

(8) Sebagai peguambela Lau, George Lo mempunyai kuasa am untuk bersetuju kepada suatu perintah persetujuan atau untuk mengkompromi sebarang perkara bagi pihaknya, atas syarat bahawa beliau bertindak secara bona fide dan bukan bertentangan dengan arahan negatif yang nyata. Seseorang klien tidak boleh mengenakan suatu had ke atas kuasa tersirat peguambelanya untuk mengkompromi prosiding itu kecuali jika had itu dibawa kepada notis pihak yang berlawanan. Tidak ada keterangan untuk mengesahkan pengataan Lau atau untuk menunjukkan bahawa bank itu atau peguambela bank itu mempunyai notis atau pengetahuan tentang sebarang had atas kuasa tersirat George Lo untuk mengkompromi prosiding itu. Lebih-lebih lagi, ketiadaan kuasa yang dikatakan itu tidak diplikan di dalam pernyataan tuntutan. Writ saman dan pernyataan tuntutan dibatalkan atas dasar bahawa tindakan itu remeh atau menyusahkan atau merupakan suatu penyalahgunaan proses mahkamah.]

Notes

For cases on setting aside consent judgments, see 2 *Mallal's Digest* (4th Ed) paras 1292 and 1356; and [1992] Mallal's Digest 276, 280.

For cases on limitation of counsel's authority, see 9 *Mallal's Digest* (4th Ed) paras 1516–1522.

Cases referred to

1 *Darley (Trustee of Baines) v Tulley* (1923) 155 LT Jo 128 (folld)
2 *Navimprex Centrala Navala v George Moundreas & Co SA* (1983) 127 SJ 392 (refd)
3 *Philip Securities (Pte) v Yong Tet Miaw* [1988] 3 MLJ 61 (refd)
4 *Wilding v Sanderson* [1897] 2 Ch 534 (folld)
5 *Watt v Assets Co Ltd* [1905] AC 317 (folld)
6 *Leaf v International Galleries* (1950) 2 KB 86; [1950] 1 All ER 693 (refd)
7 *Philipps v Philipps* (1878) 4 QBD 127 (folld)
8 *Boswell v Coaks (No 2)* (1894) 6 R 167 (folld)
9 *Lawrance v Norreys* (1890) 15 App Cas 210 (folld)
10 *Wallingford v Mutual Society* (1800) 5 App Cas 685 (refd)
11 *Hungate v Gascoigne* (1846) 2 Ph 25 (folld)
12 *Shedden v Patrick* (1854) 1 Macq 535 (folld)
13 *Norris v Le Neve* (1743) 3 Atk 27 (folld)
14 *Little v Spreadbury* [1910] 2 KB 658 (folld)
15 *Welsh v Roe* (1918) 87 LJKB 520 (folld)

Liew Shau Jin (*Liew Shau Jin & Co*) for the plaintiff.
Libat Langub (*Dr Yaacob & Ismail*) for the defendant.

Cur Adv Vult

Chong Siew Fai J: This is an application by the defendant, Bank Pembangunan Malaysia Bhd ('the bank') under O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 to strike out the writ of summons and the statement of claim of the plaintiff, Richard Lau Ming Hing @ Lau Richard MH ('Lau'), in this action.

For the bank, four affidavits were filed: one by its senior manager, Megat Zabidi bin Megat Husain, made on 23 October 1990; another by its advocate Libat Langub, made on 24 April 1991; the third, by Megat Zabidi affirmed on 9 December 1991 and the last, by Dato' Anuarul Aini bin Mohd Perai affirmed on 18 February 1992. Lau himself had an affidavit in opposition made on 22 April 1991.

Lau's claim in this action

In this action, Lau seeks to set aside the order of this court made on 21 July 1984 in Civil Suit No KG60 of 1983 between the bank as the plaintiff, and Lau and four others as the defendants. The said order made on 21 July 1984 (exh H annexed to Megat Zabidi's first affidavit) decreed that Lau's defence be struck out and that final judgment be entered against Lau in the sum of RM129,947.94 with interest and costs.

Consent order

Although the said order dated 21 July 1984 does not expressly state on it that it was made by consent, there can be no denial that it was a consent order. This is clear from the notes of proceedings (exh 1 annexed to Megat Zabidi's first affidavit) relating to the bank's application for summary judgment during which Mr George Lo of Mark Foong & Co, acting for Lau, stated on 21 July 1984 that his client (Lau) had no objection to the application. That being so, the omission to state in the order that it was made by consent does not affect the fact that it was so made. *Darley (Trustee of Baines) v Tulley*.[1] In any event, Lau himself conceded that the order is a consent order (see para 3 of his affidavit). It also cannot be disputed that the order has been drawn up, and entered.

Lau's grounds

Briefly, Lau's grounds as pleaded in the present action for setting aside the order are (see the statement of claim):

(1) that he did not execute the guarantee forming the subject matter of the action KG60 of 1983, and that he discovered this sometime in May 1989;
(2) that the order of 21 July 1984 was obtained illegally, it being 'for a larger sum if any at the time of entering of the order';
(3) that the bank failed to disclose 'such material fact during the time of obtaining the order of 21 July 1984' and he had suffered damages resulting from the said order and two unsuccessful bankruptcy proceedings following thereupon.

Civil Suit No KG60 of 1983

For a better understanding of the background of this action, it is necessary to briefly relate Suit KG60 of 1983. In that action, the bank sued Lau and four others as guarantors under a guarantee in writing for a loan advanced to a principal debtor and interest in the sum of RM129,947.94, with further interest and costs. Lau was the fifth defendant in that action.

Paragraphs 7–10 of the statement of claim read thus:

7 By an agreement in writing dated 3 April 1980 the first, second, third, fourth and fifth defendants agreed with the plaintiff that in consideration of the plaintiff granting a loan to Santiasa Hygienic Sdn Bhd, a company incorporated under the Companies Act 1965, in Sarawak, Malaysia having its registered office at No 57C & D, Lanang Road, Sibu, the first, second, third, fourth and fifth defendants will guarantee the repayment of the loan together with interest costs charges and all other sums owing by the said Santiasa Hygienic Sdn Bhd to the plaintiff.

8 The plaintiff accordingly advanced a sum of RM108,000 to the said Santiasa Hygienic Sdn Bhd.

9 On 31 May 1992 the said Santiasa Hygienic Sdn Bhd was indebted to the plaintiff in the sum of RM129,947.94 comprising RM108,000 being capital and interest in the sum of RM21,947.94.

10 In spite of repeated reminders by the plaintiff, the said Santiasa Hygienic Sdn Bhd has not paid the said sum or any part thereof.

(See exh D annexed to Megat Zabidi's first affidavit).

Lau's defence in that action was short and simple. It did not specifically plead to any matter or fact. It contained only two paragraphs: the first of which admitted paras 1–6 of the statement of claim, while the second paragraph, in answer to paras 7–10 thereof, reads:

The fifth defendant denies in whole or in part, paras (7), (8), (9) and (10) of the statement of claim.

(See exh F annexed to Megat Zabidi's first affidavit).

Subsequently, the bank took out a summons against Lau for final judgment (exh G annexed to Megat Zabidi's first affidavit). Though not expressly stated, it is obvious that the summons was taken out under O 14 for summary judgment. In para 5 of the affidavit in support made by one Feisal bin Sheikh Hussein, it was specifically deposed that in Lau's letter dated 21 March 1983 (exh FSH2), Lau admitted being a guarantor. This is also borne out in exh FSH2. (See the said exh G.)

At the hearing of the summons for summary judgment on 9 July 1984, Lau's advocate, Mr George Lo, successfully obtained an adjournment of the hearing to enable Lau to file an affidavit in reply. The summons was adjourned to 21 July 1984. On 21 July 1984, Mr Lo, representing Lau, said that his client had no objection to the application. The court, then, struck out Lau's defence and ordered final judgment to be entered against him (see para (6)(e), (f) and (g) of Megat Zabidi's first affidavit and exh 1 (notes of proceedings) annexed thereto).

The instant application

(a) Execution of the guarantee

Opposing the present application in the instant case, Lau said he did not execute the guarantee dated 3 April 1980 (see para 7(d) of his affidavit). This runs counter to the affidavit evidence of Joseph Salang ak Gandum who said that Lau signed the guarantee before him (see exh LL3 annexed to Libat's affidavit). More importantly, in his own letter dated 21 March 1983 and, as stated earlier , in his own affidavit affirmed on 24 September 1986, Lau admitted that he was one of the guarantors (see para (6)(a) and (j) of Megat Zabidi's first affidavit, exh A and paras (4) and (5) of exh M annexed thereto). These are clear, unequivocal and uncontradicted admissions. Hence by exh A dated 21 March 1983 and exh M affirmed on 24 September 1986, Lau had both before and after the commencement of the Suit CS–KG60–83, which was commenced on 14 April 1983, admitted being a guarantor.

By the present Suit KG211–1989, Lau has also clearly made contradictory statements for which he gave no explanation as to how the contradiction came about. He also seems to attempt to deny the execution of the guarantee by saying that he saw the guarantee for the first time in April 1989 and by

relying on the fact that no date was filled in the column to indicate his signature (see para 7(d) of his affidavit). It is totally inconceivable that in a matter of such personal importance to him, Lau could have readily assumed himself being a guarantor in the action in KG60 of 1983 and in the ensuing bankruptcy proceedings, only to discover by May 1989, as he alleged, that he was not a guarantor. I reject his contention that he did not execute the guarantee. The mere fact that the date was not filled in does not, in itself, indicate that the signature was not his.

(b) Judgment for a larger sum

Lau contended that the order of 21 July 1984 was obtained illegally, it being 'for a larger sum if any at the time of entering of the order'. The affidavit of Dato' Anuarul Aini, which is unchallenged, shows that sale proceeds of RM14,030 was obtained and that after deducting all costs, expenses, etc, a balance of RM4,214.40 (not RM14,030) was paid to the bank vide letter dated 9 January 1984 (see exh AP38 annexed to Anuarul Aini's affidavit).

In the particulars to para 3 of the statement of claim in this action, Lau said prior to 21 July 1984, the plaintiff (the bank) had received RM14,030. Strictly, therefore, the particulars and the affidavit of Anuarul Aini do not support the allegations. Assuming that the word 'plaintiff' was an error and should read the 'defendant', and accepting, as I do, as the truth the uncontradicted affidavit evidence of Dato' Anuarul Aini that the sum of RM4,214.40 had been paid to the bank in January 1984, ie before the making of the order on 21 July 1984, I still do not think the order ought to be set aside for the following reasons:

(1) The order is a consent order, and not a judgment in default of appearance or in default of pleading.
(2) It has been drawn up, passed and entered.
(3) There has been a long and inordinate delay (over five years and four months) in taking out this action to set it aside. I shall say more on this, later.
(4) From the notes of proceedings in Suit KG60–1983 (exh 1 annexed to Megat Zabidi's first affidavit), it is, to my mind, reasonable to conclude that it is highly probable that had the amount of RM4,214.40 paid to the bank been known or timely noted at the time of the hearing of the application on 21 July 1984, the defendant through Mr Lo, would have raised no objection to the judgment being entered. After all, in such situation, the judgment sum to be entered would have been less than that claimed in the action, and would thereby have been to Lau's advantage. In those circumstances, there would have been no conceivable valid reason that the defendant, Lau, through Mr Lo, would have objected to the lesser sum being entered for the order or judgment. As a matter of law, a consent order will not be set aside on the ground of a mistake where the mistake would not suffice to impeach the agreement on which the order was based.
(5) More importantly, no injustice is done by allowing the consent order to stand since, for the recovery of the judgment debt, the balance of

proceeds of RM4,214.40 can be deducted from the judgment sum in the consent order. This, in fact, is what the bank is prepared to do (see para 7 of Megat Zabidi's second affidavit).

In this regard, I venture to observe that the modern tendency of the courts seems to lean in favour of allowing amendment of a judgment debt to a lesser sum in cases of accidental slip or omission rather than setting aside the whole sum, where justice permits the former course to be adopted. See *Navimprex Centrala Navala v George Moundreas & Co SA*,[2] showing that the power to correct clerical mistakes was extended to those made by a party or his advisers. See also *Philip Securities (Pte) v Yong Tet Miaw*.[3] It may be noted that in those cases cited, the judgments were entered in default. In our instant case the order or judgment was entered by consent of the parties and hence is a stronger case for amendment.

In para 9(d) of Lau's affidavit, he contended that the judgment/order dated 21 July 1983 ought not to have been entered because the manner of obtaining the sum RM14,030 from sale of the fixed assets is an issue in dispute. I have perused Lau's defence in Suit KG60 of 1983 (exh F annexed to Megat Zabidi's first affidavit). The point had not been raised as an issue in the defence. Nor has it been specifically pleaded as an issue in his statement of claim in the present action. In fact in the particulars to para 3 of the statement of claim, he pleaded the amount of RM14,030 without dispute.

(c) Delay

As regards Lau's contention that there was no inordinate delay on his part in applying to set aside the order dated 21 July 1984, I disagree. On his own admission, he first took out an application on or about 27 May 1989 that ended in failure (see para 6(a) of Lau's affidavit). This is more than four years and 10 months after the consent order of 21 July 1984. He seemed to contend that there was no inordinate delay by reason of the bankruptcy proceedings instituted by the bank against him based on the consent order or judgment (see paras 6(b), (c) and (d) of Lau's affidavit). But the bankruptcy proceedings are no bar to making an application to set aside the order or judgment. He could have done so. He took out the present action on 9 December 1989, ie over five years and four months after the consent order of 21 July 1984. It is inconceivable that a lapse of over four years and 10 months or five years and four months is not a long and inordinate delay especially in the case of an order or judgment consented to by the applicant, as in our instant case. The reasons given are far from capable of being regarded as reasonable excuse for the delay. The principle governing action to set aside a consent order or a consent judgment is that the court will apply the same principles as though the judgment was a contract or compromise of which rescission is sought. See, eg *Wilding v Sanderson*.[4] The court may refuse to set aside a compromise (thus a consent order or judgment) where the party seeking to set it aside is guilty of delay in questioning it. *Watt v Assets Co Ltd*.[5] In *Leaf v International Galleries*[6] the right to rescind a contract was held barred by five years' delay despite the fact that the representee of an innocent misrepresentation only discovered

A the truth shortly before the proceedings. In our instant case, Lau, as shown above, had delayed for over four or five years. As regards the allegation of fraud which, if shown, would be a ground for rescission, or setting aside, I shall deal with it in a moment.

(d) Non-disclosure of material fact and damages suffered

B In para 5 of the statement of claim, Lau alleges non-disclosure of material fact and damages suffered. It is not clear what the material fact is that was allegedly not disclosed. If it were respecting the order having been entered for a larger sum, the point has been dealt with above.

As regards the damages allegedly suffered, they would, from the pleading, C appear to relate to two bankruptcy petitions taken out against Lau by the bank based on the consent order. They are consequential upon the entry of the consent order. As long as the consent order is in force or not set aside, the bank is entitled to act upon it. This alone is sufficient to reject the contention. Furthermore, I see no reason for the complaint of the suffer of damages. On Lau's own pleading, the two bankruptcy petitions were D unsuccessful. If that were so, Lau in the normal course of events would have been entitled to costs, if asked for.

Other points raised but not pleaded

E I shall now turn to the other points raised by Lau. All those points, however, are not pleaded in Lau's statement of claim. As a matter of pleading, a party must plead all the material facts on which he intends to rely; otherwise he is not entitled to adduce any evidence of such facts. As Brett LJ stated in *Philipps v Philipps*[7] at p 133:

F > If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial ... any fact which is not stated in the pleadings.

Though the above statement refers to 'trial', a defendant (the bank in our instant case), in its application to strike out the writ and the statement of claim under O 18 r 19, is entitled to rely on the matters the plaintiff (Lau) G has pleaded and establish that by virtue of the grounds in the said r 19 relied on, the writ and the statement of claim ought to be struck out. The duty is on the plaintiff to show that his action and pleading are unassailable.

Now, as to the points raised:

(1) Allegation of fraud

H Lau alleged fraud and said that this was discovered in April 1989 (para 7(e) of his affidavit). No particulars of the alleged fraud are given in his affidavit. If he meant to rely on his allegation that he did not sign the guarantee as the basis for the alleged fraud, this has already been dealt with in the earlier part of this judgment. Moreover, as indicated earlier, fraud has not even been I specifically pleaded at all in Lau's statement of claim herein, let alone the giving of particulars thereof. It must be remembered that Lau's action herein is to set aside the consent order or judgment. That being so, fraud, if relied on, must not be alleged in mere general terms but must be with full

particulars. *Boswell v Coaks (No 2)*;[8] *Lawrance v Norreys*;[9] *Wallingford v Mutual Society*[10] at pp 697, 701, 705, 709 (not a case to set aside a court order). And, when an application is, as now, made by the defendant (the bank) to dismiss such an action under O 18 r 19, the plaintiff (Lau) has not only to show in his statement of claim that his action is justified but must also satisfy the court by affidavits that he will probably succeed in setting aside the consent order or judgment if the action is allowed to proceed. *Boswell v Coaks (No 2)*;[8] *Hungate v Gascoigne*;[11] *Shedden v Patrick*;[12] *Norris v Le Neve.*[13] The plaintiff must, in effect, set out to show that he can substantiate his statement of claim, and that his case is of sufficient prima facie strength. In our instant case, besides the absence of any plea of fraud in the statement of claim, Lau's affidavit of 22 April 1991 contains no more than a bald allegation of fraud without condescending to any particulars.

(2) Alleged lack of instructions or authority

Lau contended that Mr George Lo, acting for him in the action KG60–1983, had no instructions or authority to consent to the order or judgment dated 21 July 1984. At the material time, the advocate firm acting for Lau was Mark Foong & Co; and it would appear that Mr George Lo was an advocate in the said advocate firm (see the letterhead in exh M annexed to Lau's affidavit). As advocate for Lau, Mr Lo had a general authority to agree to a consent order or to compromise any matter on behalf of his client in the action that has already commenced provided that he acted bona fide and not contrary to express negative instructions. *Little v Spreadbury.*[14] The client cannot impose a limitation upon the implied authority of the advocate to compromise the proceedings unless the limitation has been brought to the notice of the opposite party (the bank). *Welsh v Roe.*[15] In our instant case, there is no evidence or material from Mr George Lo to substantiate Lau's allegations. Moreover, there is also no evidence showing the bank (as plaintiff in Suit KG60 of 1983) or the bank's advocate having any notice or knowledge of any limitation on the implied authority of Mr George Lo, as advocate for Lau, to compromise the proceedings. Furthermore, as stated earlier, this alleged lack of authority or instructions on the part of Mr George Lo has not at all been pleaded in the statement of claim in this action. In the circumstance, Lau's contention of the lack of authority or instructions in his affidavit is no more than bare allegations on his part and is far from being sufficient to maintain the present action for setting aside.

(3) Consent to order or judgment despite earlier letter seeking adjournment

In para 4 of his affidavit, Lau said that his advocate Mark Foong & Co was unable to file an affidavit in opposition in Suit KG60/1983. However, according to paras (6)(f) and (g) of Megat Zabidi's first affidavit and the notes of proceedings, exh 1, annexed thereto, on 9 July 1984 the court, on Mr George Lo's request, granted an adjournment to 21 July 1984. And, on 21 July 1984, Mr Lo, despite the letter dated 18 July 1984 (exh M) seeking adjournment, did not ask for the same but stated, instead, that the plaintiff (Lau) had no objection to the defendant's (bank's) application.

While a consent order or judgment may, as a matter of law, be set aside on grounds justifying the setting aside of a contract or compromise entered into with knowledge of the material matters by legally competent parties, on the pleadings, the evidence and materials before me, and after considering submissions by counsel, and for the reasons given, I see no sufficient and valid ground justifying the setting aside of the order looked at as a contract. The application of the bank is allowed. The writ of summons and the statement of claim are struck out on the grounds as advanced in the application, more particularly, on the ground that the action is frivolous or vexatious or an abuse of the process of the court. The action is dismissed.

I have not lost sight of the bank's submission that a sum of RM4,214.40 was to be credited to Lau. However, in the absence of a proper application, I choose not to alter the judgment sum in the consent order or judgment by deducting the said sum, which can easily be taken into account in the execution of the order or judgment. In any event, the bank can easily apply formally for the alteration in the said order or judgment, if need be.

Costs of the action and of this application be paid by the plaintiff (Lau) to the defendant (the bank). In the absence of an agreement, the costs are to be taxed.

Application allowed.

Reported by Anne Khoo